No. 112.

In the

Supreme Court of the United States.

October Term, 1916.

JESSE L. HARNAGE and DELOKEE OIL & GAS COMPANY, - - - - - - *Plaintiffs in Error,*

VERSUS

ANNIE M. MARTIN and ROTH-ARGUE-MAIRE BROTHERS OIL COMPANY, *Defendants in Error*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR ON MOTION OF DEFENDANTS IN ERROR TO DISMISS OR AFFIRM.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR ON MOTION OF DEFENDANTS IN ERROR TO DISMISS OR AFFIRM.

For the purposes of this brief, the plaintiffs in error will content themselves in answering or replying to the propositions or grounds presented by the motion of the defendants in error to dismiss or affirm, answering or replying to such propositions or

grounds in the same order in which they are presented by the brief of the defendants in error filed in support of such motion.

Subdivision "*a*" of the first paragraph of the motion to dismiss, while presented as a ground or reason why this court does not have jurisdiction to review on writ of error the judgment complained of in this cause, does not, as the motion itself discloses, go to the jurisdiction of this court, but merely sets up the fact that the Supreme Court of Oklahoma was without jurisdiction to grant the writ of error or to transmit or cause to be transmitted the record in this cause, for the reason that it had lost jurisdiction of the parties and the subject matter when the mandate of the said Supreme Court of the State of Oklahoma was issued to the District Court of Washington County, Oklahoma. The pleader evidently erroneously treating or attempting to show that a writ of error operates upon the parties and subject matter of the litigation.

Realizing, as we do, that this court will take judicial notice of the laws of this and other states, and while, no doubt, this court is familiar with the appellate procedure in vogue in this state, yet for the purpose of exhibiting unto this court the efforts of the defendants in error to have this cause disposed of, without the plaintiffs in error having a fair

opportunity to make full presentation to this honorable court of the matters involved, and for the purpose of compiling, in convenient form, the only laws of the State of Oklahoma relating to the method of perfecting an appeal in cases of this nature, we quote from such laws as follows:

Section 5236 of the Revised Laws of Oklahoma, 1910, as to the jurisdiction of the Supreme Court, is as follows:

> " 5236. *Jurisdiction of Supreme Court.*—The Supreme Court may reverse, vacate or modify judgments of the county, superior or district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also reverse, vacate or modify any of the following orders of the county, superior or district court, or a judge thereof:
>
> " *First.* A final order.
>
> " *Second.* An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates or modifies an injunction; that grants or refuses a new trial; or confirms or refuses to confirm, the report of a referee; or sustains or overrules a demurrer.
>
> " *Third.* An order that involves the merits of an action, or some part thereof."

Section 5238 of the Revised Laws of Oklahoma, 1910, provides the method of appealing a cause in order to obtain a review, reversal or modification of the judgment of the lower court, and is as follows:

> " 5238. *Petition in Error.*—The proceedings to obtain such reversal, vacation or modification, shall be by petition in error, filed in the supreme court, setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record, in the original case, shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be made returnable on or before the first day of the term of the court, if issued in vacation, ten days before the commencement of the term. If issued in term time, or within ten days of the first day of the term, it shall be returnable on a day therein named. If the last publication or service of the summons shall be made ten days before the end of the term, the case shall stand for hearing at that term."

Section 5240 of the Revised Laws of Oklahoma, 1910, provides for the production of the record in the Supreme Court, and is as follows:

> " 5240. *Case-made Attached—Costs.*—In all actions hereafter instituted by petition in error in the supreme or other appellate court the plain-

tiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court; and in no such action hereafter instituted in the supreme court shall any charge, fees or costs be taxed or allowed for making any copy of any case-made, or transcript, when such copy shall be ordered by the court for its use, and the same has not been furnished by the plaintiff in error thirty days before the first day of the term at which the case shall stand for hearing, and no costs or fees shall be taxed for making a complete record in such case, except when the same shall be made by request of a party to the suit and at his own costs."

Section 5241 of the Revised Laws of Oklahoma, 1910, provides what the case-made or record shall contain, and is as follows:

" 5241. *Case-made to Contain What.*—A party desiring to have any judgment or order of the county, superior or district court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court."

Section 5258 of the Revised Laws of Oklahoma, 1910, provides for the issuance of the mandate by the appellate court, and is as follows:

" 5258. *Mandate to Issue to Lower Court.*— When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a special mandate to the court below as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein. In cases decided by the supreme court, when the facts are agreed to by the parties, or found by the court below, or a referee, and when it does not appear, by exception or otherwise, that such findings are against the weight of the evidence in the case, the supreme court shall send a mandate to the court below, directing it to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case."

Section 5259 of the Revised Laws of Oklahoma, 1910, provides for the filing of the opinion in the case, and makes same a part of the record, and is as follows:

" 5259. *Opinion to Be Filed With the Case.*—

It shall be the duty of the justices of the supreme court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed."

Section 5260 of the Revised Laws of Oklahoma, 1910, providing for the sending of a syllabus of the points of law decided in the case by the Supreme Court, together with the mandate to the lower court, is as follows:

" 5260. *Syllabus.*—A syllabus of the points of law decided in any case in the supreme court shall be stated, in writing, by the justice delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the justices concurring therein, for revisal before filing thereof, and it shall be filed with the papers, without alteration, unless by consent of the justices concurring therein; and a copy if such syllabus shall, in all cases, be sent to the court below, by the clerk of the supreme court, with the mandate provided for by section 5258."

Section 5263 of the Revised Laws of Oklahoma, 1910, abolishing writs of error, and other methods of appeal, is as follows:

> " 5263. *Writs of Error Abolished.*—Writs of error and *certiorari*, to reverse, vacate or modify judgments or final orders, in civil cases, are abolished; but court shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and *certiorari.*"

Therefore, we respectfully submit that at all times, after an appeal has been perfected from the lower to the Supreme Court of Oklahoma, the record or transcript is retained in the Supreme Court, and is the foundation of the proceedings there, and the practice in this state, as outlined by the provisions of the laws herein quoted, does not permit the transmission of the records from the Supreme Court to the inferior courts.

This court, in the case of *Atherton et al.* v. *Fowler et al.*, 23 L. ed. 265, states the rule as to which court the writ of error should be directed in order to procure the production of the record in the Supreme Court of the United States, as follows:

> " The rule may, therefore, be stated to be,

that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court for safekeeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this, we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know the record is in the possession of the inferior court and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court being the custodian of its own records, is alone authorized to certify them to us."

So, too, the clerk of the Supreme Court of the State of Oklahoma, by statute, is alone authorized to certify or exemplify a record of the proceedings had and taken in the Supreme Court of this state.

Section 8090-o, Bunn's Supplement to the Revised Laws of Oklahoma, specifying the duties of the clerk of the Supreme Court, is as follows:

" 8090-o. *Duties of Clerk.*—The Clerk of the

Supreme Court shall carefully keep a minute of the proceedings of the Supreme Court for each day, drawn up at large in a record book to be kept by him for that purpose; he shall seasonably record the judgments, decree, and orders, and properly bind the decisions of the court; he shall safely keep all records, files, books and papers committed to his charge, and also presses and furniture belonging to his office, and deliver such records, files, books, papers, presses and furniture to his successor in office; and in case of refusal or failure to deliver whatever belongs to his office to his successor, his bond may be put in suit by the Attorney General; he shall prepare for any person, demanding the same, a certified copy of any paper, record, decree, judgment or entry on file in his office, proper to be certified, for the fees prescribed by law; and he shall perform such other services as may be prescribed by law; or are usually performed by persons in like positions and such duties as may be prescribed by the Supreme Court, not in conflict with this act. The transcript filed in the Supreme Court, the process in each case, and the judgment or the decree of the court thereon, shall be the final record in the cause, and certified as such by the clerk whenever an exemplification of the judgment or decree of the court may be required."

The case of *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81, 28 L. ed. 938, cited and relied upon by counsel for defendants in error as supporting

their right to have the writ of error in this cause dismissed, because of the fact that such writ of error was directed to the Supreme Court of Oklahoma, and not to the inferior court, namely: the District Court of Washington County, Oklahoma, is not in point, because in that case it is specifically stated that the record does not, nor does a copy thereof, remain in the Supreme Court, but is by the Supreme Court remitted to the inferior court, and can be found nowhere else but in the Circuit Court of La Crosse County, the court saying:

> " It appears, by the cases cited to us and by the course of proceedings in such cases in the Wisconsin court, that the record itself is remitted to the inferior court and does not nor does a copy of it remain in the Supreme Court. Though the judgment in the Circuit Court was the judgment which the Supreme Court ordered it to enter, and was in effect the judgment of the Supreme Court, it is the only final judgment in the case, and the record of it can be found nowhere else but in the Circuit Court of La Crosse County."

That such a course of procedure as is contended for by defendants in error would have been erroneous, is shown by the case of *Underwood* v. *McVeigh*, 21 L. ed. 952, the syllabus of which is as follows:

> " Where a judgment of an inferior state court

> was affirmed in the court of appeals of the state, and upon such affirmance judgment was given in the latter court that the defendant in error recover of the plaintiffs in error his damages and costs, and such judgment was entered in the former court, the writ of error from this court must be directed to such court of appeals, and not to the inferior state court, and if directed to the inferior state court the writ of error will be dismissed."

Therefore, we respectfully submit the Supreme Court of Oklahoma being the custodian of its own records, the clerk of such court being by law designated as the only one authorized by law to certify to and exemplify such record, was the only court to which this court could properly have directed its writ in order to procure such record, and that to have directed the writ to the District Court of Washington County, Oklahoma, would have been but idle ceremony, as that tribunal could have, and probably would have, truthfully answered such writ by saying that the record of the case as decided by the Supreme Court of Oklahoma was not lodged with it.

We desire to quote further from *Atherton* v. *Fowler, supra,* wherein it is said:

> " In this case, our writ went to the Supreme Court, and, in obedience to its command, that court has sent us its record. There is now no

need of a further writ, even if the practice in California permitted the transmission of records from the Supreme Court to the inferior courts. But such, as we understand, is not the practice. The Supreme Court is there the sole custodian of its own records. Cases go there upon a transcript of the proceedings in the court below. This transcript is retained in the Supreme Court, and is the foundation of the proceedings there. The transcript is, without doubt, a copy of the proceedings in the court below; but that does not make the record below the record above. The court above acts only upon the transcript, and from that and proceedings thereon its record is made. * * *

" The motion to dismiss is denied."

It may be, and probably is, the case that counsel for the defendants in error are laboring under a misconception or misunderstanding of the law, they probably believing, as their brief would seem to indicate, that the offices or objects of a writ of error is to operate upon the parties. That such is not the law is shown by the holding of this court in the case of *Cohens* v. *Virginia*, 5 L. ed. 262, wherein it is said:

" Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record.

It removes the record into the supervising tribunal."

The only appellate procedure in existence in this state being such as is provided by statute, we respectfully submit that subdivision "*a*" of the first ground of the motion of the defendants in error to dismiss or affirm not only states erroneous propositions of law so far as the jurisdiction of this court is concerned, but is so devoid of merit that the same is not worthy of consideration, except for the purpose of exhibiting to this court the efforts of the defendants in error in their attempt to prevent the plaintiffs in error from making a full presentation to this court of the matters and things involved herein of which it complains, and thereby attempting to prevent a full consideration by this court of the judgments and decisions of the state courts brought here for the purpose of review.

Subdivision "*b*" of the first ground of the motion of the defendants in error to dismiss or affirm, is as follows:

" ***(b)*** **That there is no federal question involved herein."**

The plaintiffs in error invoke the jurisdiction of this court in this case by virtue of section 709 of

the Revised Statutes of the United States. In other words, the plaintiff in error, Harnage, claims title to the land in controversy under an Act of Congress, and the decision of the Supreme Court of Oklahoma in terms or in legal effect was against the right and title so claimed and asserted by Harnage.

Counsel for the defendants in error quote certain language of Mr. Justice MILLER, in *Murdock* v. *The City of Memphis, et al.*, 20 Wall 590, 22 L. ed. 429. Through inadvertence, or for some other reason, counsel substitute the fifth subdivision of the principles announced by Mr. Justice MILLER in this opinion for the language of the fourth subdivision, and it so happens that the part omitted from the quotation of counsel for the defendants in error announces the principle which is the crux of this case.

We hereupon again quote the material portions of this opinion:

> " *1.* That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the state court."
>
> " *2.* That it must have been decided by the state court, or that its decision was necessary to the judgment or decree, rendered in the case."

" *3.* That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States."

" *4.* These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court."

" *5.* If it finds that it was rightly decided, the judgment must be affirmed."

" *6.* If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

" *7.* But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision of the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state

court should have rendered, or remand the case to that court, as the circumstances of the case may require."

With these principles in mind, we desire to state briefly the material portions of the record in this case, which bear upon this motion to dismiss or affirm.

As the record has not yet been printed, we are unable to furnish the court with the pages of record where the following statement of fact can be found; at the same time a casual inspection of the record will immediately demonstrate the existence of the facts in the record to which we now allude.

The plaintiff in error, Harnage, and the defendant in error, Martin, are both duly enrolled members of the Cherokee tribe of Indians, and each was, therefore, entitled to an allotment of lands in the Cherokee Nation under the provisions of the so-called Cherokee Treaty, which was an Act of Congress approved July 1, 1902, 32 Stat. L. 716.

At this stage, the important thing to bear in mind is the fact that these parties were entitled to the allotment according to the provisions of this Act of Congress. Therefore, should it appear from the record that Harnage claims a right or title under this act, and that the Supreme Court of Okla-

homa either in terms or in legal effect, decided against that right or title, then the jurisdictional requirement is fully answered.

Harnage, the plaintiff in error, made the first selection of the land in controversy. Having made the first selection, no other member of that tribe could successfully attack his title under this act, excepting upon the condition that at the time of the selection by Harnage this other citizen was the owner of improvements upon the particular tract of land so selected. See section 11, Act of July 1, 1902, *supra.*

Martin, the defendant in error, contested this selection, and upon a trial before the Commission to the Five Civilized Tribes, which was the proper tribunal, the contest was decided in favor of Martin, and the land in controversy awarded to her as her allotment. Harnage prosecuted an appeal to the Commissioner of Indian Affairs, and from the Commissioner of Indian Affairs to the Secretary of the Interior, both of these officials affirming the decision of the Commission to the Five Civilized Tribes, as a result of which, so far as the Interior Department was concerned, the lands in controversy were finally awarded to Martin as her allotment. Thereafter, a patent was duly issued to her, and Harnage brought this action in equity to charge the legal title of Martin with a trust in his favor, on the theory that the

Secretary of the Interior, through a mistake of law, had awarded the lands in controversy to Martin, when the same should have been awarded to Harnage.

The pleadings in the case and the presentation of the cause to the trial and the Supreme Courts of Oklahoma, conclusively demonstrate that Harnage at all times claimed the right or title to this allotment under the provisions of the Act of Congress above referred to. The trial court and the Supreme Court of Oklahoma, in express terms as we contend, or, at any rate, in legal effect, decided against the right or title so asserted by Harnage, therefore the principles of subdivision four of the opinion of Mr. Justice MILLER, in *Murdock* v. *City of Memphis, supra,* already quoted, become at once controlling. It is there stated.

> " 4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court."

Counsel for the defendants in error assert that the one question determined by the tribal court and the Supreme Court of Oklahoma was the sufficiency of the evidence to sustain the case of the plaintiffs in error. Counsel here confuses the function which this court exercises in determining its jurisdiction with

what amounts to a consideration of the case on its merits.

The question now before this court is that stated by the first three subdivisions quoted *supra* from the opinion by Mr. Justice MILLER.

We answer the first subdivision by the statement that the record shows that Harnage claims his right or title to the lands in suit under the Act of July 1, 1902.

We answer the second subdivision by the statement that the record shows that the Supreme Court of Oklahoma, either decided adversely to Harnage's rights under this act, or that its decision upon this question was necessary to sustain its judgment, for the reason that the only law invoked by Harnage as a basis for his claim was the Act of Congress approved July 1, 1902.

We answer the third subdivision by the assertion appearing plainly from the record that the decision of the state court was against the right or title of Harnage asserted under this Act, therefore, in the language of the fourth subdivision, "*these things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.*"

Ground Two of the motion to dismiss or affirm asserts that it is manifest that this writ of error was taken by plaintiffs in error for delay only, and that the questions upon which the decision of said cause depends are so frivolous as not to need further argument.

This ground of the motion, we respectfully submit, like all the preceding grounds, is made upon a general assertion, and in the brief as filed by the defendants in error, the same is not supported by reason or authority, and while a motion to affirm, coupled with a motion to dismiss may, under the rules and decisions of this honorable court, be good pleading, yet we respectfully submit that this ground of the motion, entirely lacking in merit as it does, clearly demonstrates the efforts of the defendants in error to have this court terminate its jurisdiction of this cause, they evidently not courting a full investigation thereof at the hands of this tribunal.

In conclusion, we desire to state that what has been said herein, together with the authorities cited in support thereof, is dealing merely with the jurisdictional feature, as involved in the motion of the defendants in error to dismiss or affirm, and we have not attempted to delve into the merits of the controversy, realizing, as we do, that such would not be proper at this time.

We further submit, as shown by the authorities cited *supra*, this case is one wherein the jurisdiction of this honorable court has attached, and the plaintiffs in error feeling aggrieved at the decision of the Supreme Court of Oklahoma, and believing that error hath been by said court committed to the manifest damage of plaintiffs in error, plaintiffs in error have, by the method provided by law, brought this cause before this honorable court for the purpose of correcting such error, and restoring to plaintiffs in error that to which they believe themselves rightfully entitled.

Ground Three of the motion to dismiss or affirm moves for the vacation of the order of supersedeas, and also moves for the transferring of this cause for hearing to the summary docket.

Upon what theory defendants in error base their right to have the order of supersedeas vacated, or upon what authority, is not stated; however, insofar as this ground of the motion of the defendants in error seeks to have this cause transferred for a hearing to the summary docket, we respectfully submit that this cause is of sufficient importance and of such character as to justify a full presentation to this honorable court of the matters involved, in order that the errors, if any, which have been committed,

may be corrected, and that a proper judgment, adjudicating the rights of the parties, may be rendered; wherefore, plaintiffs in error pray that said cause be not advanced to the summary docket, but that the same be heard and determined after a full presentation, in the usual course, and that the motion of the defendants in error, for an order to dismiss or affirm, be in all things overruled and denied.

Respectfully submitted,

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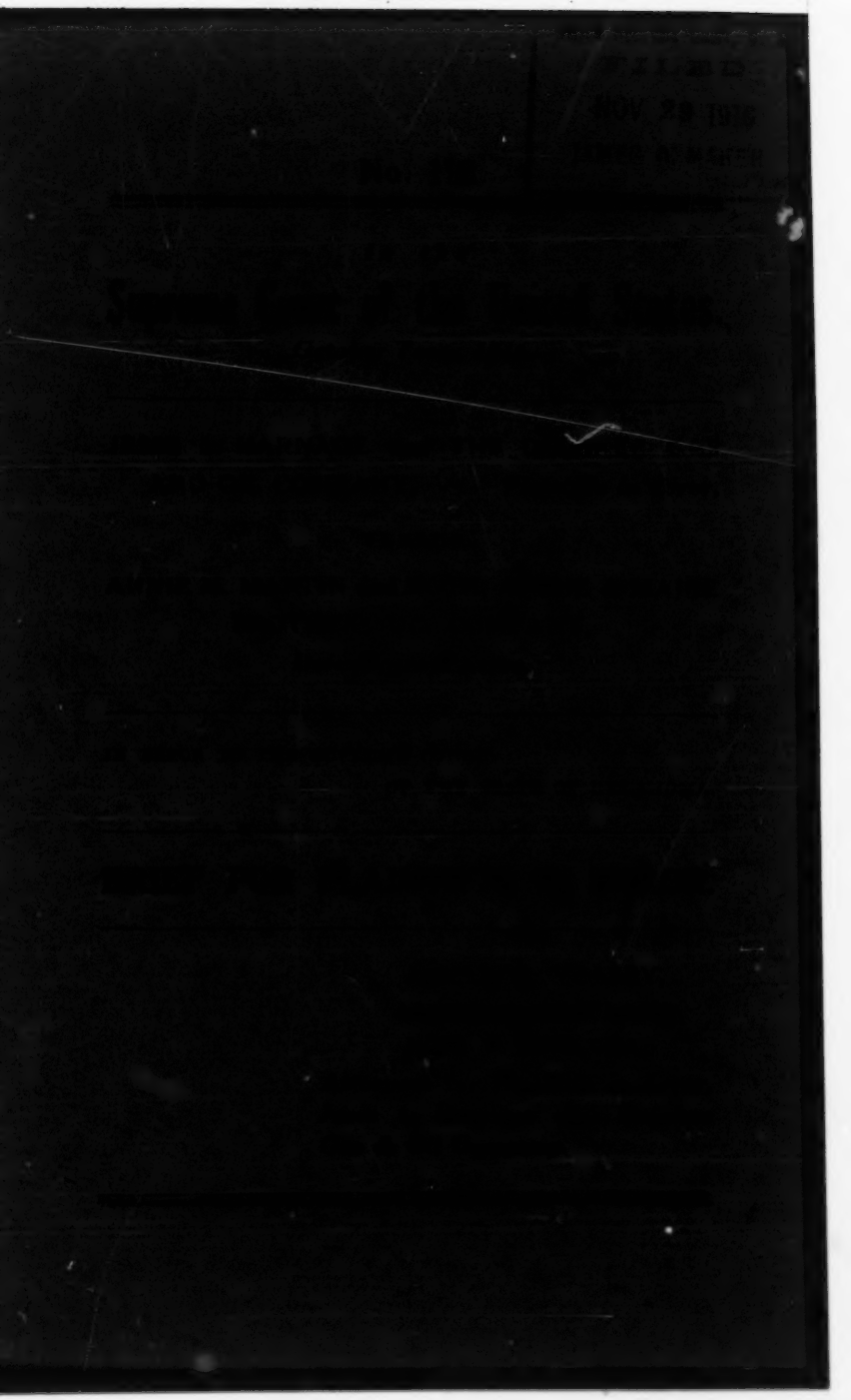

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I.

Harnage, the plaintiff in error, made the original selection of the land in controversy. The record is without dispute as to this fact. Later, the defendant in error, Martin, applied for the land before the Land Office and instituted a contest proceeding against Harnage to determine the title to the allotment. Therefore, the principle for which we are contending is that the only circumstance which would uphold the validity of the claim of Martin against Harnage for these lands was the fact that at the time the lands were selected by Harnage, Martin was the owner of the improve-

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ments on the tract. We further assert on this proposition that the Secretary of the Interior in his decision erred upon two grounds: First, that the decision, itself, does not make the ownership of the improvements the determining circumstance in the issue between these parties, and secondly, if the decision of the Secretary of the Interior did proceed upon this theory, then it must fall for the reason that there was no evidence in the record before the Secretary, nor was there evidence before the Supreme Court of Oklahoma to the effect that at the time Harnage filed Martin was the owner of the improvements on the land in controversy.... 25

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Counsel for defendants in error challenged to find and set forth in their briefs any evidence in the record before the Secretary of the Interior, which is the record now before this court, which supports or tends to support a finding that Annie Martin acquired a community interest or an individual or several interest in the improvements on the so-called Thursday Farm, or on the specific lands here in controversy..... 52

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II.

Said court erred in holding and deciding that the plaintiff in error, Harnage, was not entitled to have a trust declared in his favor in lands patented to the defendant in error, Martin, by virtue of the fact that the record herein discloses that said Harnage was the owner of the improvements upon said land, and, therefore, entitled to select the same in allotment, by virtue of the provisions of an Act of Congress, approved March 2, 1907, 34 Stat. L. 1220. That accordingly, the plaintiff in error, Harnage, was deprived of a title, right, privilege or immunity claimed by virtue of said act and said decision was against the right, title, privilege or immunity claimed by said Harnage under the provisions thereof 57

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Act of March 3, 1905 (33 Stat. L. 1048);
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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 112.

JESSE L. HARNAGE and THE DELOKEE GAS AND OIL COMPANY, - - *Plaintiffs in Error,*

vs.

ANNIE M. MARTIN and ROTH, ARGUE & MAIRE BROTHERS OIL COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *for* PLAINTIFFS *in* ERROR.

Statement.

This suit involves the title to an allotment of land in the Cherokee Nation. The plaintiff in error, Harnage, and the defendant in error, Martin, are

duly enrolled members of the Cherokee Tribe of Indians, and each claims title to the lands here involved as an allotment.

The plaintiff in error, The Delokee Gas and Oil Company, claims title to an oil and gas lease, through Harnage, and the defendant in error, Roth, Argue & Maire Brothers Oil Company, claims title to a similar lease executed by Martin. The claims of these two corporations may be disposed of at the outset by the assertion that their rights stand or fall with the rights of the particular lessor through whom title is claimed.

The plaintiff in error, Harnage, brought this suit in the District Court of Washington County, Oklahoma, in equity, for the purpose of charging the legal title to the lands herein involved, which stood in Martin, with a trust in his favor, on the ground that the Secretary of the Interior, through a gross misapprehension of the facts or a mistake of law, had awarded the land to Martin, when, under the provisions of the Cherokee Treaty and other Acts of Congress pertaining to the subject, it should have been awarded to Harnage.

Harnage, in his original petition or bill, attached certified copies of all the proceedings before the Department of the Interior in the contest case

between him and Martin, involving the land in controversy. The defendants answered, but inasmuch as the trial court, under the Oklahoma practice, sustained a demurrer to the evidence introduced by the plaintiff in error, Harnage, the allegations of these answers are immaterial. On the trial of the cause, the plaintiffs in error introduced a certified transcript of all proceedings before the Secretary of the Interior involving this allotment, which constituted all of the evidence offered with the exception of a deposition containing the testimony of an employe of the Department of the Interior, showing, as was claimed by the plaintiff in error, a departure by the department from the provisions of a certain Act of Congress. The defendants in error thereupon demurred to this evidence as not constituting a cause of action against the defendants in error, which demurrer was sustained by the trial court, and the petition of the plaintiff in error, Harnage, which was also adopted by The Delokee Gas and Oil Company, dismissed. This judgment was affirmed by the Supreme Court of Oklahoma, and hence a writ of error was issued to the Supreme Court of Oklahoma.

ABSTRACT *of the* PLEADINGS.

While the following treatment of the record in this case may not be in exact conformity with the rules of the court, the record here presented embodies 700 pages of printed matter, and we can lessen the labors of the court to a very great extent, and at the same time present the crucial points involved in this litigation by a concise abstract of the pleadings and the evidence.

The material allegations of the petition of the plaintiff in error are these:

Harnage and Martin are both duly enrolled citizens of the Cherokee Nation. The plaintiff in error, The Delokee Gas and Oil Company, is the lessee of Harnage, and the defendant in error, Roth, Argue & Maire Brothers Oil Company, is the lessee of Martin. (Rec., p. 4, and Rec., p. 33.)

The lands involved were a portion of the lands of the Cherokee Nation subject to allotment. (Rec., p. 4.) They were improved and such improvements were owned by one Mary Thursday and one Samuel Bob, who were of that class of Cherokee citizens denominated, "Delaware-Cherokee Citizens." That such ownership of improvements continued until May

13th, 1904, when the plaintiff in error, Harnage, filed on the lands in controversy, or until the 21st day of June, 1905, when the United States Court for the Northern Judicial District of the Indian Territory, by its order that day made, directed the sale of such improvements by the legal guardian of Mary Thursday, an insane person, and Samuel Bob, a minor, to the plaintiff in error, Harnage. (Rec., pp. 5 and 6, and Rec., pp. 10 and 11.)

That on the 26th day of May, 1904, Martin filed her contest against Harnage. (Rec., p. 8.) The complaint so filed by Martin appears in the record, at page 35, and is to the effect that the improvements on such land were the property of the father of Martin, and that upon his death title thereto vested in Martin. That on the 30th day of June, 1905, Wallace Thursday, the legal guardian of Mary Thursday, an insane person, and Samuel Bob, a minor, the owners of the improvements on said land, filed his petition with the Commissioner to the Five Civilized Tribes, asking that such improvements be certified for sale as the surplus improvements of these Indians, as provided by law. (Rec., pp. 9-10, and Rec., pp. 36-37.) This petition appears in full at pages 36 and 37 of the record. That the Commissioner to the Five Civilized Tribes unlawfully and arbitrarily refused to entertain said petition; refused

to order a hearing thereon, and refused to certify such improvements as the excess improvements of the two Indians referred to. (Rec., p. 10.) That on the 21st day of June, 1905, the United States Court for the Northern Judicial District of the Indian Territory, in a proceeding instituted by Wallace Thursday, guardian, as aforesaid, directed the sale of such improvements to Harnage. (Rec., pp. 10-11.) The two orders entered in this proceeding appear at pages 38, 39, 40 and 41 of the record.

That the contest case between Harnage and Martin, instituted, as aforesaid, was tried at Muskogee, Indian Territory, September 25, 1907, before the Commissioner to the Five Civilized Tribes. Both parties appearing in person and by counsel. (Rec., p. 12.) All of the evidence at this hearing was made a part of the record, pages 43 to 624, inclusive.

That on the 2nd day of January, 1908, the Commissioner to the Five Civilized Tribes, decided the contest case in favor of Martin and awarded the land in controversy to her. (Rec., p. 12, and Rec., p. 598.) That an appeal was prosecuted by Harnage to the Commissioner of Indian Affairs, who affirmed the decision of the Commissioner to the Five Civilized Tribes, and that thereupon an appeal was prosecuted to the Secretary of the Interior, who, on the 10th day of October, 1908, affirmed the decision of the

Commissioner of Indian Affairs. (Rec., pp. 603-606-613.) And that on the 5th day of December, 1908, the Secretary of the Interior denied a motion to review said decision. (Rec., p. 624.)

That thereafter a certificate of allotment and a patent conveying these lands to Martin was duly issued. (Rec., p. 13, and Rec., pp. 654 and 655.)

The plaintiff in error, The Delokee Gas and Oil Company, was made a party plaintiff, and filed its independent petition, adopting the allegations of the petition of the plaintiff in error, Harnage. (Rec., p. 660.)

The defendants in error filed their joint answer, which was a general denial (Rec., p. 629); and thereafter the defendant in error, Martin, filed her separate amended answer to the petition of the plaintiff in error. (Rec., pp. 630-659, incl.)

In view of the fact that the court below sustained a demurrer to the evidence of the plaintiff in error, the allegations of these answers, as we regard the case, are not material.

ABSTRACT *of the* EVIDENCE.

As already indicated a certified copy of all of the proceedings in connection with this contest case before the Department of the Interior was attached and made a part of the petition of the plaintiff in error, Harnage, and various documents are identified as exhibits, from "A" to "P", inclusive, certified by the Commissioner to the Five Civilized Tribes. (Rec., pp. 625-626.) These proceedings appear in full from pages 35 to 625 of the record. Upon the trial of the cause the following record was made:

> " By agreement of counsel in open court no testimony in said cause taken, but said cause was submitted by plaintiffs upon the Exhibits 'A' to 'P', inclusive, attached to plaintiff's petition and certified by the Commissioner to the Five Civilized Tribes, to the admission of which exhibits as evidence counsel for defendants agreed, and the deposition of D. H. Bynum which was read in evidence." (Rec., p. 662.)

At page 674 of the record the following stipulation appears:

> " It is further stipulated and agreed that Exhibits 'A' to 'P', inclusive, to plaintiff's amended petition as shown in this record, are

the exhibits introduced by the plaintiff in evidence, and the attorneys for defendants hereby waive the recopying of said exhibits in this record as a portion of the evidence introduced by the plaintiffs at the trial hereof and consent that the court may consider Exhibits 'A' to 'P' inclusive, as shown in this record attached to plaintiff's amended petition as the exhibits introduced by the plaintiffs at the hearing hereof—the purpose of this stipulation being to obviate the recopying of such voluminous exhibits." (Rec., pp. 674-675.)

The purpose of this reference to the record is to show that all proceedings before the Department of the Interior, being Exhibits A to P, inclusive, attached to the petition of the plaintiff in error, Harnage, were introduced and received in evidence, and that the parties stipulated that the inserting of the exhibits in this record, as a part of the petition of the plaintiff in error, should have the same effect as if the exhibits were also copied as part of the evidence introduced at the trial.

This being the situation, we desire to now briefly abstract the material evidence introduced in this cause, and in order that the court may now understand the specific questions arising from the evidence which will be relied upon by the plaintiffs in error, we here announce the following propositions:

(a) The undisputed evidence in this case will show that Harnage, the plaintiff in error, made the first selection of the land in controversy. This being true, we will contend, as a matter of law, that the only circumstance which would permit the Department of the Interior to award the lands in controversy to Martin, was the fact that in the contest case referred to in these proceedings, Martin introduced some evidence, at least, to the effect that at the time Harnage filed she, Martin, was the owner of the improvements upon the lands in controversy.

(b) That the Cherokee Treaty makes this the sole test for deciding a contest case, and if there was no evidence before the Secretary of the Interior to the effect that Martin owned the improvements at the time Harnage filed, then a contrary finding by the Secretary of the Interior was a mistake of law, and not an erroneous finding of fact, for which reason the lands should have been awarded to Harnage and not to Martin.

(c) The Act of Congress, which will be referred to later, granted to Delaware-Cherokee Citizens the right to sell their surplus improvements in a designated manner. The undisputed evidence in this case will show that Mary Thursday and Sam Bob, both of whom were incompetent, were

the owners of the improvements upon the land in controversy. Under this law, the duty devolved upon the Commissioner to the Five Civilized Tribes, upon application and a hearing, to certify e x c e s s improvements for sale, where, upon such hearing the applicants were found to be the owners thereof. In this case the undisputed evidence will show that the Commissioner to the Five Civilized Tribes arbitrarily refused to grant a hearing to Mary Thursday and Sam Bob. The undisputed evidence will further show that the United States Court directed the guardian of these incompetents to convey the improvements to Harnage at a valuation to be fixed by the official designated for that purpose by the President. That the Commissioner to the Five Civilized Tribes having arbitrarily refused to grant a hearing to determine this valuation, Harnage has done everything which the law requires of him, and his right to this allotment has been stricken down by the arbitrary and unlawful action of the Commissioner to the Five Civilized Tribes, for which reason the land should have been awarded to Harnage.

With these pivotal questions in mind, we will now proceed to analyze the evidence.

The material evidence bearing upon the ownership of the improvements is as follows:

Testimony of WALLACE THURSDAY, a witness on behalf of Harnage in the contest case before the Department of the Interior: Witness states that he is the husband of Mary Thursday, who was the mother of "Wild Bill" or Bill Bob, who was the father of Annie M. Martin. (Rec., p. 89.) That he married Mary Thursday twenty-two years before the date of this hearing, which was September 25, 1907; that he did not make the improvements on the lands in controversy, but bought the same from Johnson and Keeler (Rec., p. 89) fifteen or sixteen years before the date of the hearing; paid eight hundred dollars therefor, which money belonged to Sam Bob and Mary Thursday. That he did not use any money belonging to "Wild Bill" or Annie Martin in either making or improving the original Thursday improvements or the improvements on the land in controversy; that the improvements purchased from Johnson and Keeler consisted of two hundred and fifty acres, and the eighty acres in controversy was a part of the same. (Rec., pp. 89 and 90.) That during the year 1904 Fields and Nuckols were the tenants on the land in controversy, and witness got one-third of the crop. Witness got all of the crops on the land since the purchase from Johnson and Keeler

in 1893, and that no one else ever got any crops from such land during this time. (Rec., p. 92.) That he never told George Martin or Annie Martin, his wife, that they could file on the land in controversy. That Mary Thursday is mindless and has been in that condition twenty years. (Rec., p. 93.)

On cross examination witness stated that he drew the Delaware payment moneys of Mary Thursday and Sam Bob and used the same to pay a store account due Johnson & Keeler, and with the balance bought the farm already referred to. (Rec., pp. 96-97-98.)

Witness WILLIAM JOHNSON, introduced on behalf of Harnage at the trial of the contest case, testified:

That he was acquainted with the land in controversy, broke part of the land in '86 or '87. (Rec., p. 61.) Later sold the same to one Jacob Wheeler; in 1891 the firm of Johnson and Wheeler bought it back. In 1893, witness and Keeler, the then owners of the Wheeler farm which included the land in controversy, sold the same to Mary Thursday and Sam Bob for eight hundred dollars, the Delaware payment moneys of these persons being applied to the purchase price. Witness specifically states that all of the land in controversy was included in the sale to Mary Thursday and Sam Bob in 1893. (Rec., p. 62.)

The bill of sale given by this witness to Mary Thursday and Sam Bob, covering the improvements on the Jacob Wheeler farm which included, according to the testimony of this witness, the entire eighty acres in controversy, appears at page 35 of the record, and is as follows:

> " Bartlesville, Ind. Ter., July 25, 1893.
>
> " Know all men by these presents, That for and in consideration of the sum of Eight Hundred Dollars, the receipt of which is hereby acknowledged, we hereby sell, convey and by these presents deliver to Mary Thursday and son Bob, the following described property, the title to which we guarantee and defend, to-wit: All our right, title and interest in certain improvements on about ninety acres of land be the same more or less located in what is known as the Jacob Wheeler farm, situate about four miles South of Bartlesville, Cherokee Nation, Indian Territory, Cooweescoowee District.
>
> " (Signed) JOHNSON and KEELER.
>
> "Hy Jennings, Witness.
>
> " Filed Jan. 27, 1910, L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla."

Witness ANNIE MARTIN, the defendant in error, was introduced on her own behalf at the trial of the contest case, and upon cross examination at page 51 of the record, testified:

" Q. Do you know as a matter of fact whether the land in controversy was any part of the old Mary Thursday place; do you know that absolutely?

A. Which do you mean, the land I filed on; she bought that place?

Q. May Thursday bought that place?

A. Yes, sir.

Q. From whom did she buy it?

A. Bought it from Bill Johnson.

Q. Whose money did she use in paying for it?

A. I don't know; my brother's, I guess."

At page 57 of the record, this witness further testified as follows:

" Q. How do you claim this land?

A. Because my grand-mother bought it with father's money.

Q. You say she used your payment money in purchasing that?

A. No, I didn't say anything about that.

Q. Do you know what money she used in buying that from Johnson?

A. She used her money and my brother's money.

Q. Sam Bob's? A. Yes, sir."

At page 54 of the record, this witness testified:

" Q. When was this house which has been mentioned in the testimony put on the place?

A. I started it along the last or middle of May of this year (1907).

Q. And you are now living on the place in that house? A. Yes, sir.

Q. You filed your contest case in 1904?

A. Yes, sir.

Q. Your father never put any improvements on the eighty acres that you have filed on, had he? A. No.

Q. And the only improvements that you have ever put on the place is this little house you have described? A. Yes, sir.

Q. But you did have some sort of understanding with Wallace Thursday and Mary Thursday that they would permit you to file on there when the time for selecting allotment came? A. Yes, sir.

Q. And that was in 1898? A. Yes.

Q. The time you married? A. Yes, sir."

On the second question of fact suggested above, the evidence is as follows:

D. H. BYNUM testified that he was Chief Clerk in the office of the Commission to the Five Civilized Tribes and has the custody of all papers filed in connection with the application of Cherokee-Delaware citizens for the certification of their improved surplus holdings under certain Acts of Congress. (Rec., p. 663.) The witness identifies the petition above

referred to and stated that the same was filed with the Commission to the Five Civilized Tribes June 30, 1905 (Rec., p. 663). The petition referred to is the petition of Wallace Thursday, legal guardian of Samuel Bob and Mary Thursday, made a part of witness' deposition, and appearing at pages 667 and 668 of the record. The witness testified as follows as to the disposition of this petition:

> " Mr. Bynum, will you state what action, if any, was taken on this petition either by the Commission to the Five Civilized Tribes or by the Commissioner to the Five Civilized Tribes?
>
> A. The records of the Commission appear to be incomplete as to this point. While there is a carbon copy of a setting of said petition for hearing in the Cherokee Land Office at Tahlequah July 26, 1905, at 8 o'clock A. M., there is no date attached to said notice, nor is there any other record to show that a hearing was had at such time.
>
> Q. Mr. Bynum, if the notice described by you had in fact been set out what evidence would there be in the files of this proceeding showing that the same were sent you?
>
> A. There would be probably registry return receipts, but I do not believe they were inclosed by letter as the notice was complete in itself.
>
> Q. What have you to tell on the question as to whether or not these notices which have just

been referred to by you were in fact sent out by the Commission to the Five Civilized Tribes?

A. To the best of my information they were not sent out.

Q. I will ask you to state whether or not you have any record of a hearing had on this application which has been introduced in evidence?

A. There is no record of a hearing on this application, at least so far as the lands in controversy in this case are concerned."

On cross examination this witness said:

" Q. Mr. Bynum, what eventually became of the petition filed by Wallace Thursday as legal guardian of Mary Thursday to have certain lands set apart as surplus holdings as a Delaware-Cherokee citizen?

A. There was no action taken by the Commission to the Five Civilized Tribes and the petition appears to have been withdrawn upon application of Sam Bob and Wallace Thursday.

Q. When was the withdrawal of the petition of Sam Bob filed with the Commission?

A. It was filed December 16, 1907." (Rec., p. 664.)

The witness then identified the instruments for the withdrawal of this application. (Rec., p. 665.) They were made a part of his deposition, and appear

at pages 668, 669 and 670 of the record, and it is to be noted that in both cases the applications were withdrawn without prejudice to the rights of Harnage, the plaintiff in error.

The witness, in explanation of the failure to certify these matters, and also to explain the practice of the Commission, said:

> " The records show that owing to the pendency of contest between Hettie and Bob action was suspended on such petition until the case just mentioned should be finally decided and was not finally passed on for the reason that on December 16, 1907, Sam Bob for himself—he having become of age—and on December 5, 1907, Wallace Thursday, as guardian of Mary Thursday, filed motions withdrawing said petition." (Rec., pp. 665 and 666.)

> " The practice was to set the case for hearing after notifying all parties who appeared to be interested and to develop facts as to ownership of improvements as provided by the Act of April 21, 1904, and March 3, 1905, in conformity to those two laws." (Rec., p. 666.)

Further Proceedings.

Upon the introduction of the evidence of the plaintiffs in error, the defendants in error, under the practice in Oklahoma, demurred to such evidence on the ground generally that the evidence did not show facts sufficient to constitute a cause of action in the plaintiffs in error. (Rec., p. 671.) The court sustained this demurrer; exceptions were saved by the plaintiffs in error, and plaintiffs' cause of action was dismissed. Judgment for costs being entered against plaintiffs in error in favor of defendants in error. (Rec., p. 672.) An appeal was prosecuted to the Supreme Court of Oklahoma, the opinion appearing at pages 683 to 688, inclusive, of the record. Judgment of the trial court was affirmed and on the 27th day of January, 1914, a petition for a rehearing was denied by the Supreme Court of Oklahoma. (Rec., p. 689.)

ASSIGNMENT *of* ERRORS.

The following constitute the assignments of error, as appear at pages 692 and 693 of the record.

First. Said court erred in holding and deciding that the plaintiff in error, Harnage, a citizen of the Cherokee Indian Nation, was not entitled to have a trust declared in his favor, in lands patented to the defendant in error, Martin, also a citizen of said nation, by virtue of the fact that the record herein discloses that said Harnage made a prior selection of said lands in allotment, and inasmuch as the record further discloses that at the time of such prior selection by Harnage, the defendant in error, Martin, was not the owner of the improvements on said lands. That, accordingly, that plaintiff in error, Harnage, was deprived of a title, right, privilege or immunity claimed by virtue of an Act of Congress approved July 1, 1902, 32 Stat. L. 716, and said decision was against the title, right, privilege or immunity claimed by said Harnage under said act.

Second. Said court erred in holding and deciding that the plaintiff in error, Harnage, was not en-

titled to have a trust declared in his favor in lands patented to the defendant in error, Martin, by virtue of the fact that the record herein discloses that said Harnage was the owner of the improvements upon said land, and, therefore, entitled to select the same in allotment, by virtue of the provisions of an Act of Congress approved March 2, 1907; 34 Stat. L. 1220. That, accordingly, the plaintiff in error, Harnage, was deprived of a title, right, privilege or immunity claimed by virtue of said act and said decision was against the right, title, privilege or immunity claimed by said Harnage under the provisions thereof.

Third. Said court erred in holding and deciding that the defendant in error, Martin, was entitled to a patent from the Cherokee Nation covering the lands in controversy herein, when under various Acts of Congress relating to the allotment of lands of the Cherokee Nation among the citizens thereof in severalty the plaintiff in error, Harnage, was entitled to a patent from the Cherokee Nation covering said lands, in consequence of which said Harnage was deprived of a title, right, privilege or immunity claimed by virtue of said acts, and said decision was against said rights of said Harnage claimed thereunder.

Fourth. That under said Acts of Congress a preferential right vested in a Cherokee citizen to select a particular tract of land, in allotment, arose only when such citizen was the owner of the improvements upon said tract, and as there was no evidence in the record herein to the effect that the defendant in error, Martin, was the owner of the improvements upon the lands in controversy herein at the time of the prior selection of the same by the plaintiff in error, Harnage, that said court erred in affirming the judgment of the trial court sustaining a demurrer to the evidence of the plaintiff in error, Harnage, thereby depriving said Harnage of the right, title, privilege or immunity asserted by him in pursuance of the Acts of Congress aforesaid.

Fifth. The Supreme Court of Oklahoma committed error in denying to the plaintiffs in error the relief prayed for by them in their bill, or petition, filed herein.

JURISDICTION.

Defendants in error have filed a motion to dismiss or affirm on two grounds, one of which was that a writ of error in this case was improperly issued, in that it was addressed to the Supreme Court of Oklahoma instead of to the District Court of Washington County, Oklahoma. We filed a brief in this court in opposition to this motion, to which reference is now made, for the consideration of the court. We there contended that in view of the fact that the Supreme Court remained the custodian of the record in this case after the mandate issued that the writ of error was properly directed to that court.

The second objection to the jurisdiction was that this case did not present a federal question. This being a contest between two Cherokee Indians respecting the allotment of a particular tract of land, such allotments being made in pursuance of Acts of Congress, this court has oft times entertained jurisdiction of causes of a similar nature.

—*Ross* v. *Stewart*,
227 U. S. 530, 57 L. ed. 626;
Ross v. *Day*,
232 U. S. 110, 58 L. ed. 528;
Quinby v. *Conlan*,
104 U. S. 420, 25 L. ed. 801;
Hy-Yu-Tse-Mil-Kin v. *Smith*,
194 U. S. 401, 48 L. ed. 1039.

ARGUMENT *on the* MERITS.

Assignments 1, 3 and 4 present a single question, and will be so discussed. Concisely stated the proposition contended for by us under these assignments is this:

Harnage, the plaintiff in error, made the original selection of the land in controversy. The record is without dispute as to this fact. Later, the defendant in error, Martin, applied for the land before the Land Office and instituted a contest proceeding against Harnage to determine the title to the allotment. Therefore, the principle for which we are contending is that the only circumstance which would uphold the validity of the claim of Martin against Harnage for these lands was the fact that at the time the lands were selected by Harnage, Martin was the owner of the improvements on the tract. We further assert on this proposition that the Secretary of the Interior in his decision erred upon two grounds: *First,* that the decision, itself, does not make the ownership of the improvements the determining circumstance in the issue between these parties, and *secondly,* if the decision of the Secretary of the Interior did proceed upon this theory, then it must fall for the reason that there was

no evidence in the record before the Secretary, nor was there evidence before the Supreme Court of Oklahoma to the effect that at the time Harnage filed Martin was the owner of the improvements on the land in controversy.

The material provisions of the so-called Cherokee Treaty, 32 Stat. L. 716, are as follows:

> " *Sec. 6.* The word 'select,' and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Dawes Commission for the Cherokee Nation, for particular tracts of land."

> " *Sec. 11.* There shall be allotted by the Commission to the Five Civilized Tribes, and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, *which land may be selected by each allottee so as to include his improvements.*"

> " *Sec. 18.* It shall be unlawful after ninety days after the ratification of this act by the Cherokees, for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly

or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, *either for himself or for his wife, or for each of his minor children, if members of said tribe;* and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act, shall be deemed guilty of a misdemeanor."

As will appear later, both the Secretary of the Interior and the Supreme Court of Oklahoma made no attempt to track this law. In neither opinion is there a definite finding that Martin owned the improvements on the lands in controversy at the time Harnage filed. Conceding the necessity for clothing the Secretary of the Interior with discretion and general supervisory power relating to Indians, it is still the law that the Secretary in administering affairs of the Indians is limited by the precise letter of the Federal Statutes.

—*Goldsby* v. *Garfield,*
211 U. S. 249, 53 L. ed. 168;

Turner v. *Seep,*
179 Fed. 74;

Morrison v. *Burnett,*
154 Fed. 617;

Evans-Snyder-Buel Co. v. *McFadden,*
105 Fed. 293;

Wilcox v. *McConnel,*
13 Pet. 498, 10 L. ed. 264;
Burfenning v. *Chicago etc. R. Co.,*
163 U. S. 321, 41 L. ed. 175;
Deweese v. *Reinhard,*
165 U. S. 386, 41 L. ed. 757.

Section 11 of the treaty quoted above provides that the sole test for determining a contest before the Interior Department where members of the Five Civilized Tribes assert conflicting claims to a tract of land in allotment. This test is the ownership of the improvements upon the allotment. In the absence of this provision, the first Indian appearing before the Land Office and making formal application will acquire the title to the land, as the act of selection marks the inception of title.

—*Shipley* v. *Coulan,*
91 U. S. 330, 23 L. ed. 424;
Hy-Yu-Tse-Mil-Kin v. *Smith,*
119 Fed. 114;
Hy-Yu-Tse-Mil-Kin v. *Smith,*
194 U. S. 401, 48 L. ed. 1039.

In the absence of this provision, the principle just announced would apply regardless of the ownership of the improvements. Congress, however, legislated in the light of conditions then existing in the Cherokee Nation. For several generations the

lands of the tribe had been improved, and it was but natural that the law should be so framed as to protect these Indians in their improvements. For many years prior to the adoption of the Cherokee Treaty the improvements on land constituted the sole immovable property of the Cherokee people. A "farm" in our acceptance of the term was known as an "improvement" among the Cherokees. Improvements passed by bills of sale, were transmitted by will, descended to the heirs, and were sold by administrators to pay the debts of decedents. All of these things were provided for under the positive law of the Cherokees and the adjudications of the Cherokee Courts. Manifestly then, this was a property right which demanded protection, and even if Congress had not deemed it best to provide that protection, local conditions would have induced the Cherokee people to repudiate the treaty unless provision was made to protect them in their most valuable property right. It was under these conditions that Congress ordained, "which land may be selected by each allottee so as to include his improvements."

Here we have the positive mandate of Congress, which protects an Indian in his improvements. Therefore, if a stranger to the improvements first selected the land in allotment the real owner had a right under this provision to contest that selection. Under

the rules of practice of the Commissioner to the Five Civilized Tribes, he was required to file a complaint; the very essence of which was the allegation that the contestant was the owner of the improvements at the time the contestee filed. If the contestant supported this allegation by proper proof, the lands were awarded to him. If he failed, however, to establish the ownership of the improvements in himself, the Indian first selecting the land prevailed regardless of the ownership of the improvements resting in some other Indian who was not a party to the suit.

Section 18 reflects another condition existing at the time this treaty was made. Numerous Cherokees owned improvements covering lands in excess of the amount which they and their family were entitled to take in allotment. Moreover, hundreds of full-bloods were without improvements of any character; therefore, the necessity for this section. It is here provided that after the expiration of ninety days after the ratification of the treaty it was unlawful for any member of the tribe, either directly or indirectly, to enclose or hold possession of more lands than would provide allotments for himself, wife, and for each of his minor children. Not only was this forbidden, but a violation of the statute was made a misdemeanor. Here we have a declaration of public policy. Therefore, this law was violated

if a member of the tribe sought to hold possession of land even for one of his adult children. We lay strong emphasis upon the use of the term "for each of his minor children." This term would exclude an adult child, and for an infinitely stronger reason, would exclude "adult grand-children." The scope of this provision is of the utmost importance considering the opinions rendered by the Secretary of the Interior and the Supreme Court of Oklahoma in this case. If then, the law of this case is that the Secretary of the Interior erred unless he found that Martin was the owner of the improvements upon the lands in controversy when Harnage filed, or that the Secretary erred if a finding of this kind was made, and there was no evidence whatever to support it, it becomes important to ascertain the precise holding of the Secretary of the Interior on this question.

The full text of the opinion of the Secretary of the Interior appears at pages 613 to 620 of the record. On page 613 appearing a finding to the effect that Harnage made the first selection of the land in controversy. On the question of the ownership of the improvements, this seems to be the finding:

> " The land claimed by contestant is part of a large tract known as the Thursday place, held in 1904 and for several years prior thereto by a family of which her grandmother, who is a registered Delaware, is the Indian head.

"The northern portion of said place was acquired by the Thursday family about the year 1893 through purchase of improvements thereon as well as the possessory right thereto in which were invested the money of Mary Thursday and her grandson Samuel Bob. The southern portion was held and occupied by the family for several years prior to 1893 but whether obtained through purchase or original segregation the record does not disclose. After 1893 the two tracts taken as a whole were held by the family collectively as one place." (Rec., pp. 613 and 614.)

"It further appears that prior to 1904, the contestant was informed time and again by Wallace and Mary Thursday, in whose physical possession the farm remained, that she had an interest in the Thursday holdings and was entitled to share therein as one of the family and because of the fact that the said payments in which she had an interest were collected by her grandmother. On one occasion shortly after her marriage, she was given positive assurance to the effect that she was to have a portion of the land." (Rec., p. 614.)

While the Secretary wrote an extended opinion in this case, the above quotations are as exact an expression of the findings of fact as we are able to deduce from the somewhat involved opinion. The conclusion of the Secretary, which, we understand

is an announcement of the law of the case, is as follows:

"The Department concludes that the contestant, Annie Martin, became a member of the Thursday family in early childhood and that she continued to be such until her marriage in 1898. Part of this time, it is true, her residence with the family was constructive only, but throughout the whole of that period she was undoubtedly, in legal contemplation, a member of said family. Surely there is no presumption of law that her interest in the old Thursday place ceased merely because of her abduction therefrom and the unlawful appropriation by others of money due her. Of course, her absence while attending school, is not to be construed in any way to the prejudice of her rights as a member of the family, or to militate against her interest in the Thursday holdings.

"Before her marriage, the Act of June 28, 1898 (30 Stat. 495), became law. Section 11 of said act reads in part as follows: *Provided further,* That whenever it shall appear that any member of the tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires.

"This act guaranteed to each Indian citizen the right to select in allotment his home. That right was preserved, not only to the head of the family but also to each person who might properly be regarded as a member of the family oc-

cupying the place. But the claim of Annie Martin to share in the lands held by the Thursday family does not rest alone upon the fact that she resided on a portion of such lands and made her home thereon. The payments due her as a member of the tribe and as the heir of her father were actually made to Mary Thursday as the head of the family. This is important because it is evidential that the home of the latter was also the home of Annie Martin, and for the further reason that it tends of itself to show that said home was maintained and made possible by both.

" That Annie Martin had an interest in the Thursday holdings, considered as a whole, was apparent, not only from her own testimony, but also from that of others. * * * " (Rec., p. 617.)

" It may be contended that contestant never actually lived upon the land, but that, if entitled to any part whatever of the Thursday farm, she should have contested with Mary Thursday the right to select the original home place. The Department finds, however, that after the northern and southern portions of said farm were merged into one place, there was a recognized community of interest among the members of the family, growing out of their relationship and the mingling of their funds, whereby each had an interest in every part of the family holdings. It follows that when Samuel Bob elected to take his allotment in the northern part of the place and Mary Thursday to take hers in the southern part thereof, they impliedly relinquished to the

contestant, *i. e.*, to the remaining Indian member of the family their interest in the tract lying between their allotments." (Rec., pp. 618-619.)

"Premises considered, the Department is convinced that the contestant is entitled to select as her allotment the land claimed by her. Clearly the equities of the case are entirely on her side. Her interest in the land is not only greater than that of contestee but also of prior origin. The provisions of law cited above also confirm her right. On the other hand, the Department is thoroughly convinced that the contestee's claim is purely speculative and without merit; that he has at best but a naked paper title to the land unsupported by any right or equity, and that he has permitted himself to be a party to a series of transactions which were morally wrong." (Rec., p. 620.)

The real gist of the decision of the Secretary of the Interior was that the Thursday farm, of which the land here in controversy was a part was a community estate, or community interest, shared by Mary Thursday, Samuel Bob and Annie Martin. Bob having provided himself with an allotment out of the community property, and Mary Thursday having done likewise, the remaining land was subject to allotment by the defendant in error, Annie Martin. The Supreme Court of Oklahoma likewise adopted this view. (Rec., pp. 687-688.) Therefore, the first proposition we are called upon to meet is whether

an alleged community interest between members of an Indian family answers the requirements of the Cherokee Treaty.

It is evident that both the Secretary of the Interior and the Supreme Court of Oklahoma considered this case from a standpoint which is proper only where the rights of tribal Indians are involved. In the case of tribal Indians, the family is the controlling factor, and all things revolve around the head of the Indian family. Manifestly, the application of this principle is not in consonance with conditions which prevailed in the Cherokee Nation, or with the provisions of the Cherokee Treaty. There was no such thing in the Cherokee Nation prior to the Cherokee Treaty as community ownership. A Cherokee Indian owned an improvement just as a white man owns a farm. He could convey that improvement to any other Indian just as a white man could convey his farm. He could dispose of the improvement by will, and if he died intestate, it descended in accordance with the laws of descent of the Cherokee Nation. It is most significant that the Secretary of the Interior in his opinion at no time quoted the provisions of the Cherokee Treaty. The Secretary applied the provisions of the Curtis Act of June 28, 1898, and not an acre of the lands of the Cherokees were allotted under that act.

Turning now to a critical examination of the findings of fact and conclusions of law of the Secretary of the Interior, which, in principle, were adopted by the Supreme Court of Oklahoma, and made the basis of its decision, we find this to be the case:

The undisputed proof in this case will show that the lands in controversy here were conveyed to Mary Thursday and Sam Bob, and were paid for by the payment money of these two Indians. There was absolutely no dispute about this fact in the record before the Secretary, and as we intend to discuss the fact that there was no evidence before the Secretary to sustain the finding that Annie Martin owned the improvements later, we will confine our attention to the findings made. The Secretary found that the land in controversy was part of a large tract known as the Thursday place. That Mary Thursday, the grandmother of the defendant in error, Annie Martin, was the Indian head of the Thursday family. That the northern portion of the place was acquired by the Thursday family in 1893 by the money of Mary Thursday, and her grand-son, Samuel Bob. It is manifest, therefore, that Annie Martin had no individual or several right to the northern portion of this place, because it was bought and paid for by Mary Thursday and Sam Bob and conveyed to them jointly. The Secretary then finds that the southern

portion was held and occupied by the family for several years prior to 1893, but whether obtained through purchase or original segregation, the record does not disclose. Here again, there is no finding that Annie Martin either purchased or segregated the southern portion of the place. The Secretary does find that some of the Delaware payment moneys belonging to Martin were collected by Mary Thursday, but these funds are not traced to the purchase or segregation of any of these lands. The Secretary further finds that Annie Martin at one time was a member of this family, and finds that on several occasions, Wallace Thursday and Mary Thursday stated to Annie Martin that she had an interest in the lands, and was entitled to share therein, but there is no finding that when these assurances were given they referred to the particular tract of land in controversy. These general statements might just as well support a claim of title in Annie Martin to the lands selected by Mary Thursday or to the lands selected by Samuel Bob.

It is on the basis of these findings that the land was awarded to Martin. The Secretary finds that in 1898, Annie Martin was eighteen years old. Therefore, she was an adult when the Cherokee Treaty was adopted in 1902. In the light of these findings, the question which arises is whether the alleged com-

munity interest, such as the Secretary of the Interior found to exist in this case is sufficient to create a priority of right under the provisions of the Cherokee Treaty.

In answer to this question, we assert with positive conviction, that sections 11 and 18 of the Cherokee Treaty, already quoted, furnish a conclusive answer. Section 6 of the treaty, Act of July 1, 1902, 32 Stat. L. 716, defines the word "select" to mean formal application at the land office for particular tracts of land.

Section 20 of the same act provides for the selection of an allotment in the name of a deceased person by his administrator or executor.

Section 70 of the same act provides for the selection of allotments for minors by the father or mother, if citizens, or by the guardian or curator. The same section provides for the selection of allotments for other incompetents. In the case of an adult, however, the selection must be made, under the treaty, by the member of the tribe, himself. Therefore, this portion of section 11 of the act becomes material, "which land may be selected by each allottee so as to include his improvements." Obviously no communal interest is contemplated by this language. Not only does section 11 destroy the

principle according to which this case was decided, but section 18 goes further. It is here provided: "It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for *each of his minor children*, if members of said tribe."

The same section then declares that a violation of this section shall constitute a misdemeanor.

Section 19 of the act provides: "The United States district attorney for the northern district is required to see that the provisions of said section eighteen are strictly enforced, and he shall immediately, after the expiration of the ninety days after the ratification of this act, proceed to prosecute them for so unlawfully holding the same."

The Cherokee Treaty was ratified August 7th, 1902, and, therefore, the ninety-day period expired November 5th, 1902. At all times thereafter it was against the express provisions of the Cherokee Treaty to hold lands in the manner which the Secretary of the Interior sought to sustain in this case. The

provision of the treaty limits the holdings of the head of an Indian family to allotments for his minor children; his adult children being expressly excluded. If the adult children are excluded by this provision, there is stronger reason for saying that the adult grand children would be excluded, and the Secretary in this case found, as a fact, that Annie Martin was an adult in 1902.

Summarizing then, section 11 destroys the holding that community ownership will prevail against prior selection, and section 18 destroys the argument that Mary Thursday at the time Harnage filed had a right to hold the lands here in controversy for the benefit of the defendant in error Annie Martin.

The foregoing argument has proceeded upon the theory that the Secretary of the Interior made no finding to the effect that Annie Martin at the time Harnage filed was the owner of the improvements upon the specific land in controversy. Assuming this to be the real test, we now maintain that there was no evidence before the Secretary of the Interior, nor was there any evidence before the Supreme Court of Oklahoma, nor is there any evidence in this record, to support a finding that when Harnage filed Annie Martin was the owner of the improvements on the land in controversy.

The record shows this:

Testimony of Wallace Thursday, a witness on behalf of Harnage in the contest case before the Department of the Interior: Witness states that he is the husband of Mary Thursday, who was the mother of "Wild Bill" or Bill Bob, who was the father of Annie M. Martin (Rec., p. 89). That he had married Mary Thursday twenty-two years before the date of this hearing, which was September 25, 1907; that he did not make the improvements on the lands in controversy, but bought the same from Johnson and Keeler (Rec., p. 89) fifteen or sixteen years before the date of the hearing; paid eight hundred dollars therefor, which money belonged to Sam Bob and Mary Thursday. That he did not use any money belonging to "Wild Bill" or Annie Martin in either making or improving the original Thursday improvements or the improvements on the land in controversy; that the improvements purchased from Johnson and Keeler consisted of two hundred and fifty acres, and the eighty acres in controversy was a part of the same. (Rec., pp. 89 and 90.) That during the year 1904 Fields and Nuckols were the tenants on the land in controversy, and witness got one-third of the crop. Witness got all of the crops on the land since the purchase from Johnson and Keeler in 1893, and that no one else ever got any crops from such

land during this time (Rec., p. 92). That he never told George Martin or Annie Martin, his wife, that they could file on the land in controversy. That Mary Thursday is mindless and has been in that condition twenty years (Rec., p. 93).

On cross examination witness stated that he drew the Delaware payment moneys of Mary Thursday and Sam Bob and used the same to pay a store account due Johnson & Keeler, and with the balance bought the farm already referred to. (Rec., pp. 96-97-98.)

Witness William Johnson, introduced on behalf of Harnage at the trial of the contest case, testified:

That he was acquainted with the land in controversy, broke part of the land in '86 or '87. (Rec., p. 61.) Later sold the same to one Jacob Wheeler; in 1891 the firm of Johnson and Wheeler bought it back. In 1893, witness and Keeler the then owners of the Wheeler farm which included the land in controversy, sold the same to Mary Thursday and Sam Bob for eight hundred dollars, the Delaware payment moneys of these persons being applied to the purchase price. Witness specifically states that all of the land in controversy was included in the sale to Mary Thursday and Sam Bob in 1893 (Rec., p. 62).

The bill of sale given by this witness to Mary Thursday and Sam Bob, covering the improvements on the Jacob Wheeler farm, which included, according to the testimony of this witness, the entire eighty acres in controversy, appears at page 35 of the record, and is as follows:

> " Bartlesville, Ind. Ter., July 25, 1893.
>
> " Know all men by these presents, That for and in consideration of the sum of Eight Hundred Dollars, the receipt of which is hereby acknowledged, we hereby sell, convey and by these presents deliver to Mary Thursday and son Bob, the following described property, the title to which we guarantee and defend, to-wit: All our right, title and interest in certain improvements on about ninety acres of land be the same more or less, located in what is known as the Jacob Wheeler farm, situate about four miles south of Bartlesville, Cherokee Nation, Indian Territory, Cooweescoowee District.
>
> " (Signed) JOHNSON and KEELER.
>
> "Hy Jennings, Witness.
>
> " Filed Jan. 27, 1910, L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla."

Witness Annie Martin, the defendant in error, was introduced on her own behalf at the trial of the contest case, and upon cross examination at page 51 of the record, testified as follows:

" Q. Do you know as a matter of fact whether the land in controversy was any part of the old Mary Thursday place; do you know that absolutely?

A. Which do you mean, the land I filed on; she bought that place?

Q. May Thursday bought that place?

A. Yes, sir.

Q. Whose money did she use in paying for it?

A. I don't know; my brother's, I guess."

At page 57 of the record, this witness further testified as follows:

" Q. How do you claim this land?

A. Because my grandmother bought it with father's money.

Q. You say she used your payment money in purchasing that?

A. No, I didn't say anything about that.

Q. Do you know what money she used in buying that from Johnson?

A. She used her money and my brother's money.

Q. Sam Bob's? A. Yes, sir."

At page 54 of the record, this witness testified:

" Q. When was this house which has been mentioned in the testimony put on the place?

A. I started it along last or middle of May of this year (1907).

Q. And you are now living on the place in that house? A. Yes, sir.

Q. You filed your contest case in 1904?

A. Yes, sir.

Q. Your father never put any improvements on the eighty acres that you have filed on, had he? A. No.

Q. And the only improvements that you have ever put on the place is this little house you have described? A. Yes, sir.

Q. But you did have some sort of understanding with Wallace Thursday and Mary Thursday that they would permit you to file on there when the time for selecting allotment came? A. Yes, sir.

Q. And that was in 1898? A. Yes, sir.

Q. The time you married? A. Yes, sir."

A part of the farm so purchased on behalf of Sam Bob and Mary Thursday was selected in allotment by Samuel Bob, and Bob became involved in a contest with one Heady. In the trial of this cause, by reason of the relation of the two cases, the entire record in the *Heady-Bob* case was made a part of the record in this case, including the decision of the Secretary of the Interior in the *Heady-Bob* case. At page 620 of the record, at the conclusion of the opinion of the Secretary of the Interior in this case, it

is said: "The record in the case together with the record in the Cherokee Contest case of *Heady* v. *Bob,* is returned herewith."

In the opinion of the Secretary in the *Heady-Bob* case, the following appears:

> " At that time (April 1, 1904) Bob was a minor, and Mary (Mary Thursday) was insane, such having been her condition for many years." (Rec., p. 336.)
>
> " Some reference to the history of the land in controversy is essential to a clear understanding of the rights of the parties in interest. It is a part of the tract known as the 'Wheeler Farm,' having been held prior to 1893 by one Joseph Wheeler. From him it passed to the firm of Johnson & Keeler, of Bartlesville, Oklahoma. The next transfer was made by this firm by bill of sale dated July 25, 1893, conveying for $800 the improvements thereon, to Samuel Bob and Mary Anson (or Thursday). This bill of sale forms a part of the record in the case. The consideration for these improvements formed a part of certain payments which were made to Mary and Bob in distribution of Delaware funds. At the first payment, which was made about the year 1891, there was paid to each $510.00. Two years later, the second payment was made, each receiving at that time $490.00. In each instance, the money was paid to Wallace Thursday, who seems to have used it entirely as he alone saw fit.

The funds of these incompetents, amounting to about $1,000 each, were used partly in payment of a store account contracted by Wallace Thursday, and partly in payment for the improvements on the Wheeler Farm. It is claimed on behalf of Bob, and the claim is strongly supported by the evidence, that more than three-fourths of the sum paid for the improvements came from his Delaware money. It is evident that Bob's money, although he was but six years old at the time of the first payment, and eight years old at the time of the second, was used in part to meet the expenses of the family, and in part to provide the home which was enjoyed by him for many years. Consequently, the Department finds that as between Bob and Mary Thursday, he was the principal party in interest (Rec., p. 337) (in the Wheeler Farm). * * *"

" In the light of the complete record, it is now evident that the peculiar course which Samuel Bob has pursued in respect to the valuable property in which he is interested, cannot be explained upon any theory of intelligent self-interest, but is due to the fact that the two oil companies have endeavored to control or determine his action without nice regard to the means employed for the purpose of securing an oil lease covering both the land involved and the 80 acres tract adjoining it on the south, the latter also formed a part of the farm of which the Wheeler place was the nucleus." (Rec., p. 340.)

" Applications to select it had been made by Jess L. Harnage and Annie M. Martin, Harnage

was the first of the two to apply for this tract, which is known as the south 80; but Mrs. Martin, who is the full sister of Samuel Bob, has filed contest suit to secure it." * * * (Rec., p. 340.)

Several material observations may be made from these findings of the Secretary in the *Heady-Bob* case. In the first place, the Secretary found that on the first of April, 1904, Samuel Bob was a minor, and Mary Thursday, was a person of insane mind, such having been her condition for many years. These are the other two Indian members of the Thursday family, whose selection of part of the Thursday holdings, as found by the Secretary in this case, left Annie Martin the owner of the balance of the tract. The Secretary found that the Wheeler farm passed from Johnson and Keeler to Mary Thursday and Samuel Bob by bill of sale dated July 25, 1893. That the consideration for these lands was paid by the moneys of Mary Thursday and Samuel Bob, and that about three-fourths of the same belonged to Samuel Bob. The Secretary further found that the land here in controversy was a part of the Wheeler farm.

Now, the only evidence in this record which bears upon the ownership of the improvements on the specific tract of land here involved is that quoted above.

The testimony quoted, and the finding of the Secretary in the *Heady-Bob* case, unite in establishing the fact that the land here in controversy passed from Johnson and Keeler to Mary Thursday, an insane person, and Samuel Bob, a minor, in 1893. Their Indian money being used to pay for the place. Annie Martin, herself, concedes this to be the fact. The Secretary further finds that three-fourths of the moneys so used belonged to Samuel Bob, the minor. Therefore, we assert that if the real test in this case is the ownership of improvements on the specific lands in controversy, then there is no evidence to support a finding that the defendant in error, Annie Martin, was the owner of those improvements at the time Harnage filed.

In the opinion of the Secretary of the Interior in this case, the Secretary, in effect, found that Annie Martin, became a member of the Thursday family and acquired a community interest in the lands of the family, through the assurances of Wallace Thursday and Mary Thursday, the latter being the grandmother of Annie Martin. At the time these alleged assurances were given, the record shows that Wallace Thursday was not an Indian, and therefore had no title to these lands. Mary Thursday was an insane person, and unable to give legal effect to her action. Not only this, at the same time, Samuel Bob,

a minor, owned a three-fourths interest in the lands here in controversy. Therefore, Wallace Thursday, who had no title, and Mary Thursday, an insane person, transferred the title to the improvements here involved, when three-fourths of such improvements belonged to Samuel Bob, a minor. As the record of the evidence in this case covers 500 pages of printed matter, which will burden the court to examine, we here challenge counsel for the defendant in error to set forth in their briefs the specific evidence bearing on these questions:

(a) Any evidence in the record before the Secretary of the Interior, which is the record now before this court, which supports or tends to support a finding that Annie Martin acquired a community interest in the improvements on the so-called Thursday Farm.

(b) Any evidence in the record before the Secretary of the Interior, which is the record now before this court, which supports or tends to support a finding that Annie Martin acquired a community interest in the improvements on the specific lands here in controversy.

(c) Any evidence in the record before the Secretary of the Interior, which is the record here, which supports or tends to support a finding that An-

nie Martin acquired an individual or several interest in the improvements on the so-called Thursday Farm.

(d) Any evidence in the record before the Secretary of the Interior, or in this record, which supports or tends to support a finding that Annie Martin acquired an individual or several interest in the improvements on the specific lands here in controversy.

A candid response to these four questions on the part of counsel for the defendants in error will greatly simplify the determination of this case by the court. The most which can be said for the defendants in error is this: The defendant in error Martin was the adult grand-child of Mary Thursday. Mary Thursday and Samuel Bob, her grand-son, who was brother of Annie Martin, in 1893 acquired the improvements on a large farm, which included specifically the lands in controversy. The evidence is without dispute that the improvements just referred to were conveyed to Mary Thursday and Samuel Bob and were paid for by their money. At one period during the life of Annie Martin she lived with her grand-mother, and the Secretary made a finding of fact to the effect that some of her Indian payment money went to support the Thursday family. In 1898, which was six years before Harnage filed, An-

nie Martin married, and at no time thereafter until 1907 lived on the Thursday place. The fact that she began living on this place in 1907 has no bearing on this controversy, because Harnage's rights attached when he filed on the 13th of May, 1904, or when in June, 1905, the court directed the sale of the improvements on the land in controversy to him. In either case the right attached before Annie Martin took up her abode on the land in controversy. The Secretary further found that on several occasions before Harnage filed, Wallace Thursday, who had no interest in these improvements, and Mary Thursday, an insane person, gave Annie Martin certain assurances that she might have an allotment from the Thursday holdings. Even in the case of this finding the Secretary does not state that these assurances related to the specific lands here in controversy. Whatever statements were made seemed to have been general in character, relating just as much to the Thursday holdings outside of the tract here in controversy, as to the tract involved in this suit.

In the light of these vague and indefinite findings of fact the issue in this case resolved itself into this question: Does the mere fact that Annie Martin was related to Mary Thursday, coupled with the other facts that she was once a member of the Thursday family and some of her money was used to sup-

port the family, and she received certain assurances from Wallace Thursday and Mary Thursday, the latter an insane person, justify the conclusion that such facts are a sufficient predicate for the establishing of a community interest, whatever that is, in the improvements on the lands in controversy?

As already stated, we firmly believe that sections 11 and 18 of the Cherokee Treaty specifically excluded any such legal effect. Section 11 clearly deals with a separate and individual ownership of improvements. This section contemplates improvements made or improvements purchased by an Indian acting in his individual capacity. There might be instances where several Indians by their joint endeavors, or with their joint funds, acquired some sort of community ownership. There might be instances where an improvement would descend to several heirs, thereby establishing some sort of ownership in common but it must be manifest that section 11 does not contemplate any such legal conception as was the basis of this decision by the Secretary of the Interior.

The Secretary, it is clear, was animated somewhat by the fact that Harnage was a stranger to the Thursday family and that Annie Martin, being a member of the family, had a greater equity in this case. This, however, is precisely the situation which

is dealt with in section 18. Had it been the will of Congress that the head of an Indian family might hold sufficient improvements for any member of his family, or for any dependent, there might be some force in the position taken by the Secretary in this case. Congress, however, for reasons of public policy defined in an exact manner those classes of persons for whom the head of a family might hold improvements. Conceding for the sake of argument that on the 5th of November, 1902, Mary Thursday was holding these improvements for Annie Martin: such holding was in express contravention of section 18. The class to which Annie Martin belonged, that is, the adult grand-child of Mary Thursday, was excluded from the benefit of section 18. If Mary Thursday was in fact holding these improvements for her benefit, she was guilty of a misdemeanor under section 18, and under section 19 of the act it was the duty of the United States attorney to dispossess her as to any lands held for members of the family other than the classes specifically named in section 18. Surely then this somewhat strained equitable consideration will not outweigh the positive declaration of Congress set forth in section 18 of the act.

Questions "*c*" and "*d*" which we have addressed to counsel for the defendants in error in our judgment state the material issue in this case. Coun-

sel for the defendants in error will be unable to point to a single item of evidence in this record which supports or tends to support a finding that Annie Martin ever owned the improvements on the tract here in controversy. The only evidence on this question is that these improvements were purchased in 1893 by Mary Thursday and Samuel Bob. This ownership continued until May 13, 1904, when Harnage filed, or until June, 1905, when the United States Court directed the sale of the improvements to Harnage. It is not material to determine exactly which date marked the vesting of title in these improvements in Harnage for the reason that Harnage having filed first, the ownership of the improvements in him is not the controlling circumstance. The inquiry in this case shifted from Harnage when he made the first filing. Then when Annie Martin filed or contested the filing of Harnage, she assumed the burden of proving that at the date of Harnage's filing she was the owner of the improvements. We go to the length of saying that we will concede for the sake of argument that Harnage was not the owner of these improvements when he made this selection. We will further concede that at that time Mary Thursday and Samuel Bob owned these improvements. Had these two Indians contested the claim of Harnage, they would have prevailed because they could have shown that they owned the im-

provements. Ownership in Mary Thursday and Samuel Bob, however, does not constitute ownership in Annie Martin, and the latter having failed to show ownership in her, it is our firm conviction that the Secretary erred in awarding the lands in controversy to her.

The second assignment of error is as follows:

Second: **Said court erred in holding and deciding that the plaintiff in error, Harnage, was not entitled to have a trust declared in his favor in lands patented to the defendant in error, Martin, by virtue of the fact that the record herein discloses that said Harnage was the owner of the improvements upon said land, and, therefore, entitled to select the same in allotment, by virtue of the provisions of an Act of Congress, approved March 2, 1907, 34 Stat. L. 1220. That accordingly, the plaintiff in error, Harnage, was deprived of a title, right, privilege or immunity claimed by virtue of said act and said decision was against the right, title, privilege or immunity claimed by said Harnage under the provisions thereof.**

The Act of April 21st, 1904 (33 Stat. L. 189), provided as follows:

"That the Delaware-Cherokee citizens who have made improvements, or are in rightful possession of such improvements, in the Cherokee Nation at the time of the passage of this act, shall have the right to first select from said improved lands their allotments, and, thereafter, for a period of six months, shall have the right to sell the improvements upon their surplus holdings of lands to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose; and the vendor shall have a lien upon the rents and profits of the land on which the improvements are located for the purchase money remaining unpaid; and the vendor shall have the right to enforce such lien in any court of competent jurisdiction. The vendor may, however, elect to take and retain possession of the land at a fair cash rental to be approved by the official so as aforesaid designated, until such rental shall be sufficient to satisfy the unpaid purchase price, and when the purchase price is fully paid he shall forthwith deliver possession of the land to the purchaser; provided, however, that any crops then growing on the land shall be and remain the property of the vendor, and he may have access to the land so long as may be necessary to cultivate and gather such growing crops. Any such purchaser shall, without unreasonable delay, apply to select as an allotment the land upon which the improvements purchased by him are located, and shall submit with his applica-

tion satisfactory proof that he has in good faith purchased such improvements."

And the Act approved March 3, 1905 (33 Stat. L. 1048), extended the period within which Delaware-Cherokee citizens might sell their improvements a further period of six months from the Act of March 3, 1905, such extension being in the following language:

"That Delaware-Cherokee citizens who have made improvements, or were in rightful possession of such improvements upon lands in the Cherokee Nation on April twenty-first, nineteen hundred and four, to which there is no valid adverse claim, shall have the r i g h t within six months from the date of the approval of this act to dispose of such improvements to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose and the amount for which said improvements are disposed of, if sold, according to the provisions of this act, shall be a lien upon the rents and profits of the land until paid, and such lien may be enforced by the vendor in any court of competent jurisdiction: Provided, that the right of any Delaware-Cherokee citizen to dispose of such improvements shall, before the valuation at which the improvements may be sold, be determined under such regulations as the Secretary of the Interior may prescribe."

The opinion of the Secretary finds that Mary Thursday and Samuel Bob were Delaware-Cherokee citizens. Therefore, they were entitled to the benefit of these Acts of Congress. It will be noted that the first Act of Congress was effective only for six months from its date. The rights there conferred expired therefore October 21, 1904. The Act of March 3, 1905, was also effective only for the period of six months from the date of its approval; that is, the privileges there conferred upon Delaware-Cherokee citizens to sell their surplus improvements expired September 3rd, 1905.

It is to be noted that the improvements sold under this act were to be sold at a valuation to be approved by an official designated by the President. The act further conferred upon the Secretary of the Interior the right to make necessary regulations to determine this valuation. The President designated the United States Indian Agent, as the official to fix the valuation, and under the regulations of the Secretary, it was provided that a Cherokee-Delaware citizen seeking the benefit of the act should apply for a hearing, at which hearing the ownership of the improvements would be determined by the Commissioner to the Five Civilized Tribes, who, if satisfied from the hearing that the applicant owned the improvements, would certify that fact to the Indian

Agent, who would fix the valuation. A copy of these regulations is made a part hereof as an appendix.

On the 30th day of June, 1905, Wallace Thursday, then the legal guardian of Mary Thursday, an insane person, and of Samuel Bob, a minor, filed a petition with the Commission to the Five Civilized Tribes, setting up the ownership of the improvements on the lands here in controversy by Mary Thursday and Samuel Bob, and asking that a date be set for a hearing, to the end that proof might be offered as to the ownership of such improvements, and if upon such hearing it be found that Mary Thursday and Samuel Bob were the owners of such improvements, that the same be certified as the improved surplus holdings of these incompetents. This petition appears in the record at pages 36 and 37.

The testimony of D. H. Bynum, already set forth in this brief, shows that the Commissioners to the Five Civilized Tribes never set this matter for a hearing, but, as explained by the witness, held the matter up pending the decision of the *Heady-Bob* case. It is also explained that when this case was decided no further action was taken because these applications were withdrawn. In the first place, the applications were withdrawn without prejudice to the rights of the plaintiff in error, Harnage, and in

the second place, the applications were not withdrawn at any time during the six months' period that the Act of March 3rd, 1905, was effective. The Act of March 3rd, 1905, provides that Delaware-Cherokee citizens "* * * shall have the right within six months from the date of the approval of this act to dispose of such improvements."

Therefore, unless the Commissioner to the Five Civilized Tribes acted upon this application before September 3rd, 1905, Mary Thursday and Samuel Bob lost their right to dispose of these improvements. Their application was not withdrawn until December 15th, 1907.

Up to this stage it cannot be said that the plaintiff in error, Harnage, was prejudiced by this unwarranted action of the Commissioner to the Five Civilized Tribes. It develops, however, that on the 21st day of June, 1905, the United States Court for the Northern Judicial District of the Indian Territory entered its certain orders, authorizing Wallace Thursday, as guardian of Samuel Bob and of Mary Thursday, to sell these improvements to the plaintiff in error, Harnage, at a sum fixed and determined by the person appointed by the President to appraise the improvements. The full text of these orders appear at pages 38, 39 and 40 of the record. Under the

practice then prevailing, these orders were sufficient to consummate this transaction.

—*Cowles* v. *Lee*,
35 Okla. 159, 128 Pac. 688;
Spade v. *Martin*,
28 Okla. 384, 114 Pac. 724.

The Secretary of the Interior, in his opinion, on this aspect of the case, said:

> " Such sale was to be conducted in accordance with the regulations of the Department and would, if properly carried out, have given the purchaser the right to select the land as his allotment."

At this stage, under the proposition now discussed, we have this situation: Mary Thursday and Samuel Bob, both of whom were incompetent, owned the improvements on the lands here involved. Both were Delaware-Cherokee citizens. Unless the vague circumstances referred to by the Secretary of the Interior suffice to divest these Indians of the title to their improvements on these lands, which circumstances occurred when neither was *sui juris*, Mary Thursday and Samuel Bob were still the owners of these improvements at the time they made the application to the Commissioner to the Five Civilized Tribes, already referred to. Under the Act of March

3rd, 1905, they had until September 3rd, 1905, to dispose of their improvements. Under the regulations of the Secretary of the Interior, they could not dispose of such improvements until a hearing was had before the Commissioner to the Five Civilized Tribes, their ownership determined, and that fact certified to the Indian Agent. They made their application in time. The Commissioner arbitrarily refused to grant the hearing, or otherwise carry out the regulations, which, alone, would give these Indians the benefit of this Act of Congress. Harnage, on June 21, 1905, acquired this interest, subject to the regulations of the Secretary of the Interior. Therefore, on the principle that Harnage, having done everything which the law required of him, he will not be permitted to suffer from the omissions of the Commissioner to the Five Civilized Tribes, he, the Commissioner, being an agent of the government. Therefore, the decision of the Secretary of the Interior should have been with Harnage under this proposition.

In the case of *Ard* v. *Brandon*, 156 U. S. 537, 39 L. ed. 524, it is said:

> " He pursued the course of procedure prescribed by the statute, he made out a formal application for the entry, and tendered the requisite fees, and the application and fees were re-

jected by the officer charged with the duty of receiving them—and wrongfully rejected by him. Such wrongful rejection did not operate to deprive defendant of his equitable rights. * * *

" If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."

See, also:

Hutchins v. *Low,*
82 U. S. 15 Wall. 77, 21 L. ed. 82.

To the same effect is:

Weeks v. *Bridgman,*
159 U. S. 541, 40 L. ed. 253.

In the latter case, it is held that the rights of a person filing an application, which is wrongfully acted upon, or rejected, or not recognized, date from the time of the filing of such application.

—*Garrett* v. *Walcott,*
25 Okla. 574, 106 Pac. 848;
Wallace v. *Adams,*
143 Fed. 721.

In this brief, our arguments have been directed at the decision of the Secretary of the Interior on the

ground that the Secretary, through an error of law, awarded the lands in controversy to Martin, when the same should have been allotted to Harnage under the provisions of the Cherokee Treaty. In so doing, however, the same objections are urged to the decision of the Supreme Court of Oklahoma. On the question of community ownership being sufficient to establish a preferential right in Annie Martin, the Supreme Court of Oklahoma follows the decision of the Secretary. On the second assignment of error, just discussed, while the question was fully presented to the Supreme Court of Oklahoma, the court ignored the point. Therefore, this brief very properly is a discussion of the decision of the Supreme Court of Oklahoma, as well as of the Secretary of the Interior.

Summarizing then, it is our earnest conviction that the decision of the Supreme Court of Oklahoma should be reversed for the following reasons:

(a) Harnage, having made the first selection, the burden devolved upon Martin to prove at the time the land was selected by Harnage that she, Martin, was the owner of the improvements upon the specific land in controversy.

(b) This burden is not sustained by the finding of the Secretary that Annie Martin had a com-

munal interest, which the Secretary found to exist.

(c) There is no evidence in the record to the effect that a communal interest, in the sense that conferred upon Annie Martin a preferential right to these lands in allotment, ever vested in her.

(d) At the time of the alleged vesting of the communal interest, Mary Thursday was an insane person and Samuel Bob was a minor. Annie Martin traced her communal interest to these two incompetent persons, and consequently a claim so predicated is without foundation.

(e) If the real test in this case is a several and individual ownership of the improvements upon the lands in controversy by Annie Martin at the time Harnage filed, there is no evidence in the record to support a finding of this character.

(f) Where there is no evidence to support a finding of a *quasi*-judicial tribunal, the error is not one of fact, but is an error of law.

—*How* v. *Parker*,
190 Fed. 738;

Word v. *Joslin*,
186 U. S. 142, 46 L. ed. 1093;

U. S. Fidelity Co. v. *Bd. of Commissioners,*
145 Fed. 144;

Laing v. *Rigney,*
160 U. S. 531, 40 L. ed. 525;

Delaware R. R. Co. v. *Converse,*
139 U. S. 469, 35 L. ed. 213.

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